

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.

Employer

and

Case 6-RC-12308

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 814, AFL-CIO

Petitioner

**REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

The Employer, West Virginia University Hospitals, Inc., operates acute care hospitals in Morgantown, West Virginia, where it employs about 3,200 employees, which includes about 850 nonprofessional employees represented by the Petitioner, Laborers' International Union of North America, Local 814, AFL-CIO. In this proceeding, the Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent, as part of the larger unit of nonprofessional employees, all full-time and regular part-time medical assistants. Specifically, the Petitioner seeks a self-determination election conducted among the eight medical assistants employed by the Employer to determine whether they will be included as part of the bargaining unit of nonprofessional employees represented by the Petitioner. A hearing officer of the Board held a hearing and the parties filed timely briefs with me.

As evidenced at the hearing and in the briefs, the parties disagree on the following issue: whether the medical assistants are technical employees who cannot be included in the existing unit of nonprofessional employees.

The Employer contends the medical assistants are technical employees who cannot be included in the existing unit of nonprofessional employees under the Board's Final Rule on

Collective-Bargaining Units in the Health Care Industry (herein “the Rule”).¹ The Petitioner contends that the medical assistants are not technical employees, and share a community of interest with the represented nonprofessional employees, and may properly vote in a self-determination election to be represented as part of that unit.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the medical assistants are not technical employees. Rather they are nonprofessional employees, who share a community of interest with the already represented employees, and who may vote to be included in the existing unit of nonprofessional employees. Accordingly, I have directed a self-determination election in a voting group that consists of approximately eight employees.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer’s operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer, a West Virginia not-for-profit corporation, operates acute care hospitals located in Morgantown, West Virginia. The Employer has about 452 licensed beds, and an additional 70 behavioral medicine beds. It employs about 3,200 employees, which includes about 850 nonprofessional employees represented by the Petitioner and about 350 to 400 technical employees, who are not represented. At issue herein are eight medical assistants.²

The Petitioner has represented the nonprofessional employees employed by the Employer for many years, and the Petitioner and the Employer are parties to a current collective-bargaining agreement, which is effective by its terms from February 12, 2003 through December 31, 2005. That agreement identifies 24 job classifications of nonprofessional

¹ The Rule is set forth at 29 CFR Part 103, 54 Federal Register No. 76, pp. 16347 – 16348, 284 NLRB 1579, 1596 – 1597, approved by the Supreme Court in American Hospital Association v. NLRB, 499 U.S. 606 (1991).

² One of the medical assistants has been on an extended leave of absence.

employees represented by the Petitioner, who are referred to by the parties as service employees.

The medical assistants at issue in this proceeding are in the Employer's Nursing Department. The Nursing Department is under the overall direction of the Vice President of Nursing, Dottie Oakes. Among the managerial personnel reporting to Oakes is the Director of the Perioperative Services Department.³ Among the Managers reporting to the Director of Perioperative Services is Manager Judy Schmidt, who oversees three units in the Perioperative Services Department: the pre-admission unit, the post-anesthesia unit, and the Ruby Day Surgery Center.⁴ The medical assistants at issue herein rotate assignments in the pre-admission unit and the Ruby Day Surgery Center.⁵

II. MEDICAL ASSISTANTS

The record reveals the following information about the duties, other terms and conditions of employment, and qualifications of the medical assistants.

A. Duties of Medical Assistants

The pre-admission unit is where patients report prior to surgery, and the Ruby Day Surgery Center is the same-day surgery unit. The Ruby Day Surgery Center is located on the second floor of Ruby Memorial Hospital, and the pre-admission unit is located on the fourth floor of the Physician Office Center, which is adjacent to and connected with the Hospital.

More specifically, patients typically report to the pre-admission unit at some point before the day of their scheduled surgery. At the pre-admission unit, the patient is first seen by a medical assistant, then the patient has an assessment by a registered nurse, and then, if the

³ That position is currently vacant and Oakes is serving as the interim Director.

⁴ The parties have stipulated, and I find, that Oakes and Schmidt are supervisors within the meaning of Section 2(11) of the Act in that they have the authority to hire and fire employees, to effectively recommend such action, and to direct the workforce.

⁵ Under the Employer's chain of command, the medical assistants report to a charge nurse, who in turn reports to Manager Schmidt.

patient is going to have anesthesia, the patient is evaluated by a physician's assistant. The medical assistants obtain heights and weights, take vital signs, perform phlebotomy, collect specimens, and perform 12-lead EKG's,⁶ if necessary. The medical assistants spend about half their time performing these clinical tasks, and about half their time in the charting area.

In the charting area, the medical assistants work on the charts of patients who are not having anesthesia, and the registered nurses work on the charts of the patients who are having anesthesia. The medical assistants review the charts for the next day's surgery to ensure that the charts are complete. They contact the patients to notify them of the scheduled time of arrival at the hospital for surgery and they relay the pre-operative instructions to the patients. When performing both the clinical and charting aspects of the job, the medical assistants enter information and orders into computers.

At the Ruby Day Surgery Center, the medical assistants work in two areas: Areas A and C. Area A is the starting point for patients coming from outside the hospital for surgery and certain procedures. On a typical day, 60 patients come through Area A. After reporting in, patients are taken to cubicals, where they are prepped for surgery. It is the role of the medical assistant working in the Center to direct the flow of patients through Area A to the operating rooms.

In directing the flow of patients through Area A, the medical assistant is notified by the receptionist when patients arrive at the Center. The medical assistant decides the order in which patients are taken, assigns the patients to cubicals using a so-called "bed board", and notifies the perioperative care associate to bring the patient to a certain cubical. The medical assistants must deal with patient cancellations, and adjustments in the surgery schedules. In the event a patient cancels, the medical assistant notifies the appropriate secretary and the nurse, who may direct the medical assistant to contact another patient. The medical assistant

⁶ The EKG printout indicates if it is normal or abnormal. If the printout shows abnormal results, the medical assistant notifies the physician's assistant or the registered nurse.

handles incoming phone calls and communicates with surgeons, nursing staff, and perioperative care associates who work in the area.

Area C handles GI and pain patients, who are having so-called bedside procedures. The function of the medical assistant in Area C is similar to the function of the medical assistant in Area A.

In addition to the medical assistants in the pre-admission unit and the Ruby Day Surgery Center, the Employer anticipates hiring one medical assistant to work in the endoscopy area. The position was previously filled, but has been vacant for about a year. In this position, the medical assistant will work directly with the physician, assisting him as he performs various procedures, and will be responsible for cleaning and handling equipment.⁷

B. Duties of Bargaining Unit Employees

The bargaining unit includes several classifications of employees in the Nursing Department: clinical associates, perioperative care associates, phlebotomists, anesthesia aides, support aides, and unit clerks. Of these job classifications, those with duties the most similar to the medical assistants are the perioperative care associates and the unit clerks.

The perioperative care associates work in the Ruby Day Surgery Center, getting patients ready for their surgery and helping them after surgery. Before surgery, they bring patients in from the waiting area, provide them with gowns, and take their vital signs.⁸ After surgery, they provide drinks or ice bags to the patients, assist patients in going to the restroom and getting dressed, and take vital signs.

The unit clerks, who are also in the bargaining unit, prepare charts in a manner similar to the medical assistants in the pre-admission unit. According to their job description, the unit

⁷ Inasmuch as the position of medical assistant in the endoscopy area is not currently filled, and has not been filled for approximately one year, I do not decide whether that position is a technical position.

⁸ A registered nurse also assesses the patients, and the anesthesiologist and the surgeon may meet with the patients.

clerks also greet patients, complete admitting information in a computer, locate and assign beds, and notify the referring physician of admission, as requested.

There are two aspects of the medical assistants' jobs, however, that no other bargaining unit employees perform: directing the flow of patients as done by the medical assistants in the Ruby Day Surgery Center, and performing 12-lead EKGs as done by the medical assistants in the pre-admission unit.

C. Other Terms and Conditions of Employment of Medical Assistants

The medical assistants work in both the pre-admission unit and in the Ruby Day Surgery Center. The medical assistants are cross-trained to work in both units and they rotate through both units.⁹

The medical assistants work mostly eight hour shifts,¹⁰ Monday through Friday.¹¹ In the pre-admission unit, one medical assistant works from 8:30 a.m. to 5 p.m. and one works from 9:30 a.m. to 6 p.m. in the clinical areas, and one works from 10:00 a.m. to 6:30 p.m. in the chart area. In the Ruby Day Surgery Center, the hours are from 5:30 a.m. to 2 p.m. or from 7:30 a.m. to 4 p.m. The perioperative care associates cover for the medical assistants on break periods, and may cover if there are call offs.

The wage rates for the medical assistants range from \$8.88 to \$12.79 per hour and the average pay of the current medical assistants is \$9.59 per hour. In the bargaining unit, there are job classifications being paid a higher starting rate, namely, the registered central service technician and the certified registered central service technician. The average wage for bargaining unit employees is \$9.40 per hour. The wage rates for LPNs, who the parties agree are technical employees, range from \$12.01 to \$18.02 per hour, and the wage rates for surgical

⁹ One medical assistant does not rotate through both units.

¹⁰ There are some ten hour shifts.

¹¹ The perioperative care associates work similar shifts.

technicians, who the parties also agree are technical employees, range from \$11.18 to \$16.10 per hour.

The medical assistants wear uniforms in the pre-admission unit and scrubs in the Ruby Day Surgery Center, the same as the other employees on those units.¹²

D. Qualifications of Medical Assistants and Bargaining Unit Employees

The medical assistant job description states that medical assistant certification is required for the position. According to the Employer's Human Resources Director, this certification requirement can be met by attending a one-year vocational program and then taking a test, or by attending a two-year program for an associate's degree.¹³ Of the eight medical assistants, five have two-year associate's degrees, two have attended a one-year program, and one was grandfathered into the position based on her experience.

Within the bargaining unit there are two job classifications that are required to possess certification, the registered central service technician and the certified registered central service technician. These positions are in the sterile processing area, and evolved from one job which had been included in the bargaining unit.

The Employer's Human Resources Director considers the medical assistants to be technical employees, posts the medical assistant position as a technical position and recruits for the position from vocational-technical schools. She conducts wage surveys for the medical assistant position from a broad geographic area as she does for other technical jobs.

¹² The hospital pays for the scrubs worn by the medical assistants in the Ruby Day Surgery Center, but not for the uniforms worn by them in the pre-admission unit. There are some bargaining unit employees who also pay for their own uniforms.

¹³ One of the current medical assistants testified that she had completed a one-year course, but had not taken a certification test.

III. ANALYSIS

A. Technical Employees Defined

As noted, the parties disagree as to whether the petitioned-for medical assistants are technical employees, who cannot be included in the existing bargaining unit of nonprofessional employees. In the rulemaking process, the Board discussed and analyzed a number of factors in support of its determination that technical employees at an acute care hospital constituted a separate appropriate bargaining unit.

Technical employees are found in major occupational groups including: medical laboratory, respiratory therapy, radiography, emergency medicine and medical records. The evidence presented at the hearings demonstrates that technical employees perform jobs involving the use of independent judgment and specialized training, as opposed to service and maintenance employees who generally perform unskilled tasks and need only a high school education [T]echnical employees occupy a high-prestige status distinct from other categories of nonprofessional employees because of the training requirements for their jobs.

Technical employees further are distinguished by the support role they play within the hospital, and by the fact that they work in patient care. Examples of their work include: routine clinical tests performed by medical laboratory technicians; general respiratory care administered by respiratory therapists; and x-rays, ultrasound procedures, and CAT scans performed by various technicians.

... [T]he evidence shows that all health care technical employees have significant additional education and/or training beyond high school, including: community college associate degree programs which provide math and science background beyond that which high schools offer; vocational training programs run by hospitals; programs at accredited schools of technology; and, in some fields, a full 4-year college degree.

Further, the evidence indicates that most hospital technical employees are either certified (usually by passing a national examination), licensed, or required to register with the appropriate state authority, although laws regarding such licensure, registration, training and qualifications vary throughout the country.

...Although, in general, hospitals apply similar benefit and labor relations policies to technical and other nonprofessional employees, the evidence shows that the wages and hours of technical employees differ significantly from those of the other nonprofessionals. ...On the average, technicians earn \$2,000 per year more than service workers in this industry. ...[T]echnicians' wages are tied to the earnings of the more highly skilled technologists with whom they work, and they generally earn approximately 75% of what the technologists earn.

. . . There is no temporary interchange, and little permanent interchange between technical employees and other nonprofessionals because of the difference in skills, the specialized functions of the technicals, and the differences in their education. . . . Contrary to statements of industry witnesses who maintain that a service worker could take a six-week training program and be able to read EKG equipment, we are persuaded that technical training requires full or nearly full-time education, and a high school education does not provide the mathematics and science background necessary.

284 NLRB at 1553 – 1555.

B. Discussion of Duties of Medical Assistants

While the Board has not directly decided whether employees performing the composite of functions performed by the medical assistants herein are technical employees, it has decided that employees performing many of the separate functions of the medical assistants herein are not technical employees.

As noted, in the clinical area of the pre-admission unit, the medical assistants draw blood and perform 12-lead EKGs. The Board has consistently held that phlebotomists and EKG technicians are not technical employees and should not appropriately be included in a unit of technical employees. Southern Maryland Hospital, 274 NLRB 1470, 1473-1475 (1985) (phlebotomists and EKG technicians); Middlesex General Hospital, 239 NLRB 837, 838 (1978) (phlebotomists); Children's Hospital of Pittsburgh, 222 NLRB 588, 594 (1976) (EKG technicians); St. Elizabeth's Hospital of Boston, 220 NLRB 325, 329 (1975) (EKG technicians); Trinity Memorial Hospital of Cudahy, 219 NLRB 215, 218 (1975) (EKG technicians).¹⁴

In addition to drawing blood and performing 12-lead EKGs, the medical assistants in the clinical area of the pre-admission unit also obtain the height and weight of patients, take vital signs, and collect specimens. These duties are substantially similar to the duties performed by the perioperative care associates, who are included in the bargaining unit. Further, the duties of

¹⁴ Consistent with these Board cases, the existing bargaining unit of nonprofessional employees at the hospital includes the phlebotomists. Apparently, the Employer does not employ EKG technicians.

the medical assistants when working in the charting area of the pre-admission unit are similar to the duties of the unit clerks with respect to charting, and the unit clerks are included in the bargaining unit.

Further, the work performed by the medical assistants in the Ruby Day Surgery Center in directing the flow of patients through the pre-operative areas by means of a bed board is also similar to the work of the unit clerks. The unit clerks greet patients, complete admitting information into a computer, locate and assign beds, and notify the referring physician of admission, as requested.¹⁵

Bryan Medical Group, Inc., Case 8-RC-15872, July 9, 1999, cited by the Employer, is factually distinguishable. Unlike the medical assistants in Bryan Medical Group, the medical assistants here do not take a patient's clinical history, they do not perform blood sugar tests, and they do not obtain throat cultures. In Bryan Medical Group, the duties of the medical assistants were "very similar" to the duties of the LPNs with whom they worked, and the Regional Director noted that Board law consistently has found LPNs to be technical employees. In the instant case, however, the duties of the medical assistants are very similar to the duties of the perioperative care associates and unit clerks who are included in the current bargaining unit.

C. Discussion of Qualifications and Wages of Medical Assistants

Not only are the duties of the medical assistants similar to those of bargaining unit employees, but also the qualifications of the medical assistants are comparable to the qualifications for the registered central service technician and the certified registered central service technician, both of which classifications are bargaining unit positions. Further, the

¹⁵ These duties are also similar to the assignment of beds typically performed by admitting clerks in hospitals. The Board has consistently found admitting clerks to be clerical employees, but not technical employees. See e.g. William W. Backus Hospital, 220 NLRB 414, 415-416 (1975); North Dade Medical Center, 210 NLRB 588, 590 (1974). In this regard, I note that when the medical assistants herein are performing such functions in the Ruby Day Surgery Center, their work is more akin to the work of hospital clericals than to business office clericals. Of course, the medical assistants herein also regularly perform hands-on patient care duties when working in the pre-admission unit.

wages of the medical assistants are comparable to those of bargaining unit employees and are even less than the registered central service technician and the certified registered central service technician. In addition, the wages of the medical assistants are considerably lower than the wages of LPNs and surgical technicians, positions that the parties agree are technical.

D. Placement of Medical Assistants in Nonprofessional Unit

The record evidence discussed above not only establishes that the medical assistants are not technical employees under the Act, but also demonstrates that the medical assistants share a community of interest with the other nonprofessional employees who are represented by the Petitioner. That is, the medical assistants are in the same administrative reporting chain as other nursing staff, perform many of the same duties as the perioperative care associates, phlebotomists and unit clerks, are paid wages comparable to bargaining unit employees, wear the same uniforms as bargaining unit employees, and are required to have the same type of qualifications as the registered central service technician and the certified registered central service technician. On this basis, the mutuality of interests between the medical assistants and the bargaining unit employees demonstrates that the placement of the medical assistants in the represented unit is appropriate, if the medical assistants so desire.¹⁶

For the reasons set forth herein, I have found that it is appropriate to conduct a self-determination election among the Employer's medical assistants to determine if they wish to be represented by the Petitioner in the existing unit of nonprofessional employees.

¹⁶ In this regard, it is noted that when issuing the Rule, the Board found that the eight units enumerated therein are the only appropriate units in an acute care hospital absent "extraordinary circumstances", which are to be narrowly defined. 284 NLRB at 1576. Inasmuch as the medical assistants are not technical employees, and are not one of the other six enumerated units, they would normally be included in a nonprofessional unit, absent extraordinary circumstances. The Employer does not assert that such extraordinary circumstances exist, and the record evidence, as noted, would not support such an assertion. To the contrary, the record evidence establishes that the medical assistants share a community of interest with the other nonprofessional employees.

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and is a health care institution within the meaning of Section 2(14) of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees¹⁷ of the Employer constitute a voting group which may vote whether or not they wish to be represented by the Petitioner in the current nonprofessional unit:

All full-time and regular part-time medical assistants employed by the Employer at its Morgantown, West Virginia facility; excluding all business office clerical employees, technical employees, skilled maintenance employees, and guards, professional employees and supervisors as defined in the Act, and all other employees.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Laborers' International Union of North America, Local 814, AFL-CIO. The date, time and place of the election will be

¹⁷ As noted in footnote 7 above, I have not decided the status of the medical assistant in the endoscopy area.

specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be deemed to have indicated the desire to be included in the nonprofessional unit currently represented by the Petitioner, and the Petitioner may bargain for the employees in the voting group as part of the unit. If a majority of valid ballots are cast against representation, the employees will be deemed to have indicated the desire to remain unrepresented. In that event, a certification of results of election will issue.

A. Voting Eligibility

Eligible to vote in the election are those in the voting group who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Voting group employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list

of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **March 26, 2004**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the

election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **April 2, 2004**. The request may **not** be filed by facsimile.

Dated: March 19, 2004

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

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